July 27, 2004
VIA ECFS

Ms. Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, D.C. 20554

Re: Docket MB 04-61 (and Docket MB 04-64, Docket MB 04-02)
Broadcast Flag Digital Outputs

Dear Ms. Dortch,

Digital Content Protection LLC ("DCP"), licensor of the High-bandwidth Digital Content Protection technology ("HDCP") submits this ex parte filing in response to the latest round of arguments made by Philips in opposition to the HDCP technology. This filing is joined by Intel Corporation ("Intel"), the founding member of DCP. Intel is also a founding member of Digital Transmission Licensing Authority ("DTLA", licensor of DTCP) and a founding member of the 4C Entity LLC ("4C", licensor of CPRM), and therefore asks that this filing be considered in those proceedings as well. Intel joins in this filing to draw the Commission's attention to the importance of its decision in these proceedings not only with respect to HDCP, DTCP and CPRM, but also because of the impact it may have on intellectual property licensing going forward. The Commission should understand that neither DCP nor Intel are opposed to other licensing schemes,[1] and in fact welcome other licensors to offer a variety of choices in the marketplace.

[1] Intel, for example, has participated in a number of industry consortia and standards bodies where industry participants develop specifications and commit to a variety of licensing schemes, including "reasonable and non-discriminatory" licensing, "royalty-free but otherwise reasonable and non-discriminatory" licensing, and even "royalty-free" licensing. DCP, DTLA and 4C are not, however, standards bodies but private collaborations that offer proprietary technologies to eco-system participants under license terms and conditions designed to encourage implementation.

There is not, however, a "one size fits all" shoe to wear, and no technology licensor should be compelled to wear and walk in the shoes designed by and to fit another.

1. Government Should Leave Licensing Details to Private Parties. As a general principle, Intel and DCP believe that intellectual property licensing should be left to private parties in the marketplace. In this context, a licensor is best situated to determine whether to license its intellectual property, and if so, what terms are reasonable. This fundamental principle is more important than the particular licensing models that are being discussed by the Commission in these proceedings. Philips, however, does not seem to respect this fundamental principle, at least with respect to licenses offered by others.[2] Philips is asking the Commission to establish itself, rather than individual intellectual property licensors and market forces, as the entity that determines what constitutes a reasonable and non-discriminatory license and dictate those terms and conditions to private parties in the market place (so long as the Commission dictates what Philips wants). This is a particularly draconian request in these proceedings where the FCC has (i) specifically invited and openly welcomed any interested party to submit technologies for consideration as approved outputs, technologies that are by definition entirely optional and voluntary at the implementer's discretion, (ii) in fact received many such requests for approval, and (iii) has opened the door widely for further requests going forward. The Commission should decline Philips' invitation to intervene in the details of private licensing provisions.

[2] Philips is asking the Commission to dictate how DCP, DTLA and 4C license Intel's intellectual property via the HDCP, DTCP and CPRM license agreements by requiring those licenses to change the current reciprocal non-assert requirement to give Philips discretion to instead offer to license its own intellectual property on specifically undefined "reasonable and non-discriminatory" terms.

By all commonly understood principles of "reasonable and non-discriminatory licensing", the HDCP license, as well as the DTCP and CPRM licenses, is reasonable and non-discriminatory.[3] Philips' suggestion that reasonable and non-discriminatory has some more specific meaning, or that a third party (like the Commission or a standards body) should intervene into the private license process and determine what it means, has been broadly and repeatedly rejected. See, e.g., the DTLA filings which discuss this matter at some length. The Commission should not deviate from these well established principles.

2. **These Digital Output Proceedings are Not an Anti-trust Adjudication**. By its arguments, Philips is asking the Commission to turn these interim digital output approval proceedings into an anti-trust adjudication. Philips is asking the FCC, with no judicial inquiry of any kind, to find that the non-assert provision in the HDCP (and DTCP and CPRM) license is *per se* anti-competitive, and impose a specific anti-trust penalty on DCP (and DTLA and 4C) by requiring it to amend its license in accordance with Philips' demands. There simply is no relevant authority to support either the requested process or the requested result. See, e.g., the DTLA filings which discuss this matter at some length.[4] The law already provides specific rights and remedies with respect to the kinds of competition claims that Philips is asking the Commission to address. The Commission should leave those types of claims where they properly belong and resist Philips' invitation to transform these proceedings into something they simply are not.

[3] Administrative and key generation fees associated with these licenses are below market rates and therefore clearly reasonable. The licenses are offered to all similarly situated ecosystem participants on the same terms and conditions, and therefore devoid of discrimination.

[4] Philips' attempts to liken the HDCP, DTCP and CPRM technologies and non-asserts to certain Microsoft technologies and license agreements is both legally and factually absurd. See, e.g., the discussion of these points in the DTLA and 4C filings.

3. **Approving HDCP (and DTCP and CPRM) is in the Public Interest**. At the heart of the Commission's inquiry is whether approving these technologies is in the public interest. HDCP was developed and offered to all implementers for the sole purpose of advancing the digital transition. It is in the public interest for consumers with HDCP protected digital outputs already in their homes to protect cable, satellite and DVD transmissions to use that same digital output to protect terrestrial digital broadcast TV out to their displays. Similarly, it is clearly in the public interest to allow DCP's existing licensees to use HDCP under their current license to design products that protect digital terrestrial broadcast. The same is true for DTCP and CPRM. Philips, however, is asking the Commission to effectively stall the DTV transition with respect to these technologies until the world is rearranged "according to Philips". Until that time, Philips is asking the Commission to deny consumers who own HDCP equipped high-definition digital televisions and other products the right to use those products to consume digital broadcast television. Until that time, Philips is asking the Commission to refuse to let HDCP's numerous licensees design products that use HDCP to protect digital broadcast television. These requests are openly anti-competitive because they deny manufacturers the ability to exercise their current license rights and compete with the analog world. These requests are also blatantly anti-consumer because they seek to devalue the devices already in consumer homes and eliminate digital alternatives. Delaying the approval of HDCP and other digital technologies does only one thing: delay the transition to digital and force consumers to remain in the existing analog world. There are many, including perhaps Philips, who simply do not want to see the digital transition take place, believing their own business interests are best served in the unprotected world of analog outputs

and recording re-digitized analog signals. The Commission should reject this invitation and speed the DTV transition.

4. **The HDCP License promotes Competition**. The HDCP license is offered by DCP as a low-cost license to enable and encourage the DTV transition. The license is good for competition and consumers. The license is offered to all manufacturers on the same terms and conditions. As a current licensee, Philips enjoys the benefits of the HDCP license, including its low administration and key generation costs, the specific HDCP patent license granted directly to it by Intel (the developer of the HDCP technology), and the narrow non-asserts given to it by all of the other HDCP licensees as contained in the HDCP license. See, e.g. the Cineos[5] line of products at www.philips.com, which advertise HDCP protected DVI. Despite these benefits, Philips' is asking the FCC to enable it to reap the benefits of the HDCP license and at the same time provide it the opportunity to profit on its fellow licensees (including Intel). This result would be patently unfair and discriminate against all licensees but Philips.

5. The Non-Asserts Are Narrowly Tailored and Reasonable. The HDCP specification (as well as the DTCP and CPRM specifications) specifically and narrowly define a cryptographic protocol and device authentication technology that is only "HDCP" (or DTCP or CPRM as the case may be) when used in conjunction with specific and unique device keys provided by DCP (or DTLA or 4C as the case may be). These are not general purpose technologies, but highly specific ones. The non-asserts in the HDCP license (same is true for DTCP and CPRM) are expressly limited to HDCP as it is defined with particularity in the specification, do not exceed the scope of the patent

[5] Marks and brands are the property of their respective owners.

license granted, and do not apply to any aspect of any technology or any implementation that is not specifically HDCP. The non-asserts are narrowly tailored and reasonable.

6. The Commission is Approving Options, Not Requirements. The broadcast flag regulation requires demodulator implementations to respond to the broadcast flag, prevent the content from being indiscriminately distributed over the internet, and be robust against attack by ordinary users. The regulation does not require implementers to use any particular technology. The regulation does not mandate any particular product design. Bound recordings and "robust methods" are approved. Analog outputs and analog recording are permitted. A number of other digital rights management technologies are also up for approval. Simply put, a wide variety of product configurations that do not include HDCP (or CPRM or DTCP) will be available. In this context, HDCP (and for that matter DTCP and CPRM) represents an implementation choice, and the Commission should view these proceedings from that perspective when giving its approval. The Commission simply is not requiring anyone to license and implement any of these technologies.

7. The Philips' Proposal Can Not Be Implemented Fairly. Philips has suggested that the Commission can simply require DCP (and DTLA and 4C) to give its licensees a choice to either give the non-assert, or instead simply have the option of committing to "RND" licensing (however a particular HDCP licensee might define that in its discretion). That option, however, is not workable without completely voiding all of the existing license agreements first and terminating all of the patent licenses already granted by Intel. That is not a reasonable possibility (for HDCP, DTCP and/or CPRM).

From a purely legal perspective, DCP cannot unilaterally terminate or materially change the terms of the HDCP license agreements it has entered into. They are binding agreements. From a "non-discrimination" perspective, DCP is not in a position to simply offer a new license for exactly the same technology without discriminating against some (or all) of the existing licensees. This is particularly problematic as enormous investments have been made in justifiable reliance on these license agreements. If the FCC were to require this option for any licensee, it must as a matter of fairness and non-discrimination also permit this option for the technology licensor(s), who have forgone market rate royalties to enable these new market segments.[6] This would mean, for example, that Intel would have the right to charge commercial rates for all HDCP licensees (including Philips), and include additional terms and conditions that Intel deemed appropriate. From a strategic licensing perspective, this might be a good business opportunity for Intel that enhances the value of its HDCP patent intellectual property. But in practice, these are some of the very reasons this approach would be unfair at this stage in the game.

Imagine the outcry from existing HDCP licensees if Intel suddenly changed its current patent license (that has no direct royalty associated with it) into a royalty bearing license with a 5% royalty based on the product transfer price.[7] Imagine the outcry if Intel suddenly included a very broad defensive suspension provision as a condition of its

[6] In fact, although Intel is the developer of HDCP and a co-developer of DTCP and CPRM, Intel is bound by the terms and conditions of these licenses with respect to its own implementations, and has in fact agreed to these same non-asserts as an adopter.

[7] If Philips' arguments that, for example, HDCP and DTCP are "necessary technologies" are true, then surely those technologies should be able to command solid market rates.

license.[8] Imagine the confusion in the marketplace if at this late stage in the game one competitor that had previously agreed not to sue another competitor was relieved of that obligation. Imagine the confusion surrounding "reasonable terms" if Intel is compelled to honor its existing patent license with one licensee (which has no direct royalty component and the terms are all spelled out in the existing license), but required to negotiate entirely separate terms with respect to another licensee because it has elected an RND option required by the Commission. Would the Commission dictate the terms of Intel's "RND license" with that licensee, or of that licensee's RND license with Intel and the other licensees? Would Intel be prohibited by the Commission from including a non-assert in its "RND license"? How would those disputes be resolved? Would the Commission oversee those private negotiations as well, and order remedies where it deemed them appropriate? What about entities in the future who might claim to have a "necessary claim" to implement a technology approved by the Commission; will the Commission step in and oversee their private license negotiations and license terms, or otherwise compel them to license those necessary claims if they refuse? What about a competitor who might have a "necessary claim" but who has decided not to license HDCP (or DTCP or CPRM), but instead decides to use that "necessary claim" to stop a competitor or prevent an approved technology from gaining wide acceptance in the market? Will the Commission address those issues as well? These are real issues that have to be addressed when considering the Philips' proposal because this is precisely the course that Philips has asked the Commission to take, and precisely the reason why the

[8] Again, if Philips' arguments are correct and these technologies must be deployed by a large number of companies, the defensive value of Intel's patents in this space increases dramatically, and broad defensive suspension provisions may be appropriate.

Commission should leave the details of these private licensing arrangements to private parties in the marketplace.

Despite the appeal of parts of this scenario from a purely theoretical licensing perspective, implementing the Philips proposal at this stage in the licensing regime of HDCP produces only confusion and chaos for everyone but Philips. Intel is simply not in a legal or ethical position to change the rules of the game at this late hour, and can not support this unreasonable and discriminatory result as a matter of principle even if the Commission deems it acceptable. This analysis and conclusion applies not only to HDCP, but directly to DTCP and CPRM as well.

8. The Commission Should Not Discriminate Among Technology Licensors.

Philips argues that the Commission should single out the HDCP, DTCP and CPRM technology licenses for strict scrutiny, yet voices no licensing concern about (i) wholly proprietary technologies with no licensing obligations at all, (ii) fundamental technologies that are actually required to receive, demodulate and detect the broadcast flag in order to comply with the regulation (the only real mandate here), (iii) other technologies that may actually be desirable to build and offer a broadcast flag product (e.g., MPEG, IEEE 1394, recordable and other format technologies, etc.), and (iv) the host of other potentially relevant intellectual property held by companies that do not build products themselves but generate patents for the sole purpose of extracting revenue from those who do build products. In this context, the heightened scrutiny given these particular content protection technologies, all of which are by regulation optional, discriminates against this particular class of technology licensors who have spent years enabling the DTV transition with choices, not requirements. In this context, Philips has

not called for the Commission to do anything that might in fact facilitate intellectual property licensing, or enable the DTV transition by *encouraging* the implementation of digital technologies (including but not limited to these). To the contrary, Philips has consistently asked only that the Commission accept Philips' licensing practices (which it no doubt feels are in its own best interests as licensor), and reject the licensing approaches of others that Philips does not see in its own best interest. The Commission should not support the kind of blatant self serving discrimination that Philips advocates. It discourages companies from innovating and doing the hard work associated with enabling new market-segments. It encourages companies to sit on the sidelines, wait for others to do all of the enabling work, and then, when a technology is actually deployed and relied on in the marketplace, come forward with nothing to offer the ecosystem but the threat of litigation, a toll booth and a tin cup.

Conclusions.

For these reasons, and those cited in DCP's other filings, and the other filings that Intel is indirectly associated with in response to Philips' self-serving mischief (DTLA and 4C), DCP and Intel respectfully asks the Commission to approve not only HDCP, but as many other digital technologies as possible, including Philips'.

Respectfully Submitted,

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Cc: Via Email

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